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CITATIONS

CASES:

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1947. No. 611.

LOEW'S, INC., PARAMOUNT PICTURES, INC., R. K. O. RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, STANLEY COMPANY OF AMERICA, INC., UNIVERSAL FILM EXCHANGES, INC., and UNITED ARTISTS CORPORATION,

Petitioners,

v.

WILLIAM GOLDMAN THEATRES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR WILLIAM GOLDMAN THEATRES, INC., IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 1342) from which this appeal is taken is as yet unreported. The prior opinion of the Circuit Court of Appeals (R. 989a) dealing with liability is reported at 150 F. 2d 738.

The opinion of the Circuit Court of Appeals in the bill of review proceeding (R. 1334) is reported at 163 F. 2d 241.

The two opinions of the District Court (R. 975a and R. 1001a) are reported, respectively, at 54 F. Supp. 1011 and 69 F. Supp. 103.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 6, 1948 (R. 1344). The petition for a writ of certiorari was entered on February 20, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

Sherman Act, 26 Stat. 209, 15 U. S. C. A. 1-7 and Clayton Act, 38 Stat. 731, 15 U. S. C. A. 12-27.

STATEMENT.

Respondent submits that the petition and briefs filed in this case fail to present the factual situation accurately.

The critical facts, briefly summarized, are, it is submitted, as follows:

1. The petitioners-defendants constitute a group of eight corporations which control the production and distribution of "practically all" the first-class feature motion pictures made in the United States (Finding of Fact 15, R. 935a).

2. Five of the defendants (Loew's, Inc., Paramount Pictures, Inc., R. K. O. Radio Pictures, Inc., Twentieth Century-Fox Film Corporation and Warner Bros. Pictures, Inc.) are engaged also in the business of operating theatres. Altogether, they control and operate over 3000 theatres. These theatres are located in some 900 cities throughout the United States, and are usually the best theatres, or the only first-run theatres, in the district.

In almost all instances, no more than one of the defendants has theatres in any particular city. In many instances, whole states have been allocated to a single defendant.[1] This geographical allocation enables each one of the "Big 5" defendants to exhibit in its own theatres all the pictures produced by the entire group of defendants. The obvious result of this plan is to enable the defendants to monopolize the national film supply, to fix theatre admission prices at will, and to exclude an independent theatre owner altogether from the first-run competitive field.

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[1] These facts are stated in full detail in the Brief for the United States in the pending case of The United States of America v. Paramount Pictures, Inc., et al., October Term, 1947, No. 79.

3. In the City of Philadelphia, the defendant Warner Bros. Pictures, Inc. controlled and operated all first-run theatres after the year 1936;[2] and of course, this defendant thereby obtained for first-run exhibition in its Philadelphia theatres all the feature pictures produced by all the other defendants.

In this connection, the trial court found the facts as follows (R. 977a, 978a):

> "By separate contract with each of the Distributors, prior to November 9, 1940, all the grade A feature pictures licensed by the Distributors and Warner for first-run exhibition in Philadelphia have been licensed exclusively to Warner; and it may be said at the outset that the plaintiff's evidence establishes that, as a result of substantially uniform action by each distributor with Warner, Warner has obtained, in Philadelphia a controlling position in the exhibition of first run grade A feature pictures, which I shall assume can be properly described as a monopoly, according to the popular understanding and dictionary definitions of that term" (R. 977a).
>
> "In the present case it can hardly be denied that Warner desired and contemplated that first runs of grade A pictures should be shown only in its theatres and, for its own protection if nothing else, that other exhibitors should be excluded from access to such films until after its clearance periods" (R. 978a).

4. The respondent-plaintiff is a corporation managed by its president, William Goldman, a highly experienced motion picture theatre operator (Finding of Fact 24, R. 436a).

5. In 1940, for the purpose of competing with Warner in the first-run motion picture field, the plaintiff acquired

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[2] Prior to 1936, the defendant Twentieth Century-Fox Film Corporation operated its own theatre, in a building owned by it, located at 16th and Market Streets in Philadelphia. On July 28, 1936, Fox leased the theatre to Warner, thus making the Warner first-run Philadelphia monopoly complete and absolute, since before that date Warner had already acquired all other first-run theatres.

by lease the possession and control of the Erlanger Theatre, located at 21st and Market Streets in central Philadelphia. The rental specified in the lease was $12,000 per year plus 35% of the operating profit (R. 1016a).

6. With respect to the qualifications of the Erlanger Theatre, the trial court found as a fact that (R. 975a and R. 936a):

> "Since November 9, 1940 the plaintiff, who is an experienced and successful motion picture theatre operator, has been the lessee of the Erlanger Theatre—a large, modern theatre, handsomely appointed, located at 21st and Market Streets, in what might be called the fringe of the downtown Philadelphia theatre district, and suitable for the exhibition of first-run feature pictures" (R. 975a).[3]
>
> "19. With respect to size, location, appointments, management, reputation and all other respects, the Erlanger theatre is suitable for profitable exhibition of first-class feature motion pictures on first-run in competition with the theatres operated by Stanley Company of America, Inc. [a wholly owned subsidiary of Warner Bros. Pictures, Inc.], in Philadelphia" (R. 936a).

7. No defendant has ever filed of record in the District Court any objection to these findings, or to any of the other findings heretofore or hereinafter mentioned. In the briefs filed in the Circuit Court of Appeals, the defendants attacked the above quoted findings with respect to the ele-

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[3] These unnumbered quotations of findings, and those that follow, are taken from the opinion of the trial court. With respect to them, the pending Petition asserts that they are merely ". . . certain statements of the trial judge which could not possibly have been intended as findings . . ." (p. 14). On the contrary, however, the opinion of the trial court declares that: "The statements of fact and law appearing in the opinion may be taken as special findings and conclusions" (R. 984a). The numbered quotations which follow are formal findings requested by the plaintiff. As is hereinafter more fully stated, no objection or exception has ever been filed of record to any of these findings.

ments of location and reputation, but no attack of any kind was ever made in the trial court where the finding was made. Moreover, the defendants' alleged objection to the location and reputation of the Erlanger Theatre was not raised, as it could have been, either in the defendants' answers to the complaint or in the answers to interrogatories. Further reference to defendants' alleged objection to the location and reputation of the Erlanger Theatre will be made in the argument, *infra*.

8. After acquiring the Erlanger Theatre, and making necessary preparations, the plaintiff notified each of the defendants that plaintiff intended to begin operation of the theatre on September 1, 1941, as a first-run theatre, and plaintiff requested defendants to make available the necessary supply of films.

In this connection, the trial court found as a fact that (R. 936a):

> "22. After leasing the Erlanger theatre plaintiff repeatedly requested the distributor defendants to lease feature pictures for first-run exhibition therein, and plaintiff in good faith offered to pay the defendants higher prices for pictures than the prices said defendants were receiving from Stanley Company of America, Inc."
>
> "23. Plaintiff was enabled to offer to distributor defendants higher prices for feature pictures because of the favorable terms on which plaintiff had leased the Erlanger Theatre."

9. Each and every one of the defendants refused to license any first-run pictures for exhibition at the Erlanger Theatre and therefore plaintiff found it impossible to open the theatre and it stood dark and unused throughout the damage period.

In this connection the trial court found the facts to be as follows (R. 975-76a, R. 938a):

"The Distributors and Warner have refused to lease grade A feature pictures to the plaintiff for first-run exhibition at the Erlanger. It is a fact that, without access to the first-run of the defendants' pictures, the plaintiff cannot successfully operate the Erlanger Theatre as a first-run theatre. As a result of his inability to obtain the defendants' first-runs he has incurred financial loss" (R. 975-76a).

"31. Each and every distributor defendant as well as Vitagraph, Inc., knew that every other distributor defendant was leasing its feature pictures for first-run exhibition in Philadelphia at the theatres operated by Stanley Company of America, Inc., to the exclusion of plaintiff's theatre" (R. 938a).

10. In interrogatories, plaintiff asked the defendants to state their reasons for refusing to license any of their pictures for exhibition at the Erlanger Theatre, and in answering no defendant stated any objection to the theatre or its management, but each defendant merely stated, in substance, that it considered it economically advantageous to continue its exclusive relations with Warner Bros. (R. 48a, 85a, 108a, 129a, 141a, 205a, 250a, 263a).

For example, the answer of the defendant United Artists Corporation was as quoted below (R. 263a):

"21. Is there any reason why you should not enter into a contract with the complainant in this case for the exhibition of your pictures first-run at the Erlanger Theatre? If so, state your reason or reasons.

A. Yes. United Artists Corporation has for many years been releasing the feature pictures which it distributes for first-run exhibition in the City of Philadelphia, through Warner Bros. Circuit Management Corporation. It derives many economic advantages from its dealings with this customer. A contract with the complainant for the exhibition of United Artists Corporation's pictures first-run at the Erlanger Theatre

would not be economically advantageous to the United Artists Corporation."

11. With respect to defendants' reasons for refusing to license the Erlanger, the trial court found as a fact (never challenged as aforesaid) that (R. 937-38a):

> "30. The distributor defendants have refused to lease pictures for exhibition at the Erlanger theatre solely because that theatre was not under the control of Stanley Company of America, Inc., and if said theatre had been under the control of the Stanley Company of America, Inc., the distributor defendants would have leased pictures for exhibition therein at all times since November 9, 1940."

12. The defendants' disrespect for the provisions of the Anti-Trust Laws is accentuated by the facts pertaining to the Mastbaum Theatre, which facts are as follows:

The defendant Warner Bros. erected the Mastbaum Theatre in 1929 at 20th and Market Streets, in Philadelphia, or, on the same street as, and just one city block distant from the plaintiff's Erlanger Theatre. The theatre was originally operated by this defendant on a combined stage-presentation and first-run motion picture program. As a result of the financial depression of the 1930's, the theatre was closed absolutely in 1935, and remained closed and unused until 1942. On September 3, 1942—or almost two years after the plaintiff acquired the Erlanger Theatre, and while the plaintiff was asking for and being refused a supply of pictures for the Erlanger Theatre—Warner Bros. reopened the Mastbaum Theatre as a first-run motion picture theatre exclusively. From time to time, each of the defendants, excepting only Loew's, Inc., licensed its feature productions for exhibition in that theatre. After the reopening of the Mastbaum Theatre, the total first-run motion picture theatre attendance in Philadelphia showed an increase of 76% and the Mastbaum proved to be, in the

language of the trial court "conspicuously successful" (R. 1008a), and, actually, the most successful of all first-run theatres.[4]

13. The case was tried to the court, without a jury, commencing November 15, 1943.

14. At the trial the plaintiff proved the facts aforestated and the defendants elected not to offer any evidence.

15. Notwithstanding the abovementioned facts, the trial court at the conclusion of plaintiff's proofs on the question of liability, and without receiving evidence on the question of amount of damages, reached the conclusion that plaintiff had not proved a violation of the Anti-Trust Laws and therefore ordered the complaint dismissed and entered judgment for the defendant-petitioners.

This judgment appears to have been entered primarily on the theory that the Anti-Trust Laws do not apply to a monopoly of a single phase of a business (the first-run exhibition business) in a geographical area limited to the Philadelphia district[5] (R. 983a).

16. The plaintiff duly appealed the entry of judgment for the defendants.

17. The Circuit Court of Appeals reversed the judgment and directed the trial court to enter a decree restraining

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[4] Prior to the reopening of the Mastbaum Theatre, Warner Bros. first-run Philadelphia theatres consisted of: (1) The Stanley Theatre, located at 19th and Market Streets; (2) the Fox Theatre, located at 16th and Market Streets; (3) the Aldine Theatre, located at 19th and Chestnut Streets (one square south of Market Street), and (4) the Boyd Theatre, located on Chestnut Street between 19th and 20th Streets (R. 1132a).

[5] The Philadelphia theatre district in fact includes not only all of the City and County of Philadelphia but also four additional counties in Southeastern Pennsylvania, five counties in the State of New Jersey and the entire State of Delaware. In other words, the first-run theatres of Warner Bros. Pictures, Inc. in central Philadelphia were given priority over all other theatres located in this tri-state district.

continuance of the monopoly, and to hear evidence to determine, if possible, the amount of damage sustained by the plaintiff (R. 998a; 150 F. 2d 738).

The Court of Appeals concluded that, on the admitted or undisputed facts of the case, the findings of the trial court, quoted above, were supported by the proofs and that: *"There can be no possible dispute about these findings"*[6] (R. 990a, 150 F. 2d at page 741).

The Court of Appeals also concluded that the evidence justified two additional findings, stated by the Court as follows (R. 991a-92a, 150 F. 2d at page 742, notes 13 and 14):

> "13. While the precise fact was not found by the Court below, plaintiff's inability to procure the feature pictures it desired was obviously not and could not be based on the fitness of plaintiff's theatre which had never been used for subsequent-run pictures.
>
> 14. The Court below refused to find that the successful operation of the Mastbaum theatre by Warner Brothers was evidence that the public would have patronized from November 1940, plaintiff's Erlanger theatre for the exhibition of first-run pictures. We think there was ample evidence to support such a finding."

18. The trial was duly resumed, and the plaintiff placed in evidence all the facts pertaining to gross receipts and costs of operation of the five first-run theatres operated by Warner Bros. Pictures, Inc., in Philadelphia.

19. The plaintiff requested the court to fix the amount of damage on the basis of the actual receipts of the monopolists' theatres, with appropriate deductions for costs of operation, treating the Erlanger Theatre as equal to the monopolists' theatres.

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[6] The defendants' assertion (Brief, p. 18) that the Circuit Court refused ". . . to weigh . . . the evidence contained in the Record . . ." is obviously incorrect.

20. On the basis of absolute equality of theatres, the amount of plaintiff's damage would have come to over $300,000.00.

21. The trial Judge entered a verdict and judgment in the amount of $125,000 on the theory that if the Erlanger Theatre had been in operation its receipts probably would not have equaled the average receipts of the monopolists' theatres, particularly during the first fifteen months of operation, for three reasons,[7] viz. (R. 1010a-11a):

(a) A breaking-in period would precede realization of the full earning power of the theatre.

(b) The theatre is located one city-block farther west than any of the other Philadelphia first-run theatres.

(c) The theatre lacked air conditioning equipment which might affect patronage during the mid-summer months.

22. The trial Judge also stated that in arriving at the amount of damage he took into consideration the fact that under its lease the plaintiff would have been required to pay to the lessor of the theatre thirty-five percent of the operating profit (R. 1011a).[7]

23. The trial court also entered an injunction restraining continuance of the conspiracy to monopolize and directing the defendants to make their productions reasonably available to plaintiff for use in the Erlanger Theatre (R. 1012a).

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[7] Plaintiff disagrees with this reasoning but accepts the result under the rule that: ". . . the question as to the amount of the plaintiff's damages having been properly submitted to the jury, its determination as to this matter is conclusive" (Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359 at page 379).

24. The abovementioned judgment and injunction were entered on December 19, 1946.

25. Defendants appealed again to the Circuit Court of Appeals.

26. While the abovementioned appeal was pending, but unargued (to wit, on April 29, 1947), the defendants filed a petition to the Circuit Court of Appeals for leave to petition the District Court for leave to file a bill of review of the judgment and decree entered December 19, 1946 (R. 1301a).

27. The abovementioned petition was based on the theory and contentions that (a) following entry of the judgment and decree of December 19, 1946, the defendants offered to make available to plaintiff a number of pictures for use in the Erlanger Theatre; (b) plaintiff failed to take advantage of any of these offers, and failed to open the Erlanger Theatre; (c) since the institution of this action (on December 8, 1942) the plaintiff had acquired three other theatres located in central Philadelphia (e. g., the Goldman Theatre, the Karlton Theatre and the Keiths Theatre) and plaintiff had obtained from defendants a number of first-run feature pictures for use in these theatres, and plaintiff had elected to use in those theatres all the first-run feature pictures obtained by it, instead of using any of them in the Erlanger Theatre, thereby allegedly evincing an intent not to use the Erlanger Theatre as a first-run theatre.

28. On August 11, 1947 the Circuit Court of Appeals rendered an opinion and order dismissing the abovementioned petition on the grounds that the averments thereof were immaterial and, in any event, were filed too late (R. 1334a).

29. The defendants did not appeal from the abovementioned order.

30. As a result of the fact that during the arguments made on the abovementioned petition the defendants committed themselves, notwithstanding the pending appeal, to make a supply of pictures available to the Erlanger Theatre, the plaintiff made all necessary arrangements for opening the theatre on August 30, 1947 (R. 1321a, et seq.).

31. On January 6, 1948, the Circuit Court of Appeals rendered an opinion and order dismissing the appeal referred to in paragraph 25, *supra*, and affirming the final judgment and decree of the District Court (R. 1342-43a).

32. On February 20, 1948, the defendants filed the pending petition for certiorari.

ARGUMENT.

Point I.

The Proof of Conspiracy Was Sufficient.

Two briefs have been filed by the petitioners,—one by the so-called Distributor defendants and one by the Warner defendants.

The Distributor defendants advance two points, viz.:

1. Plaintiff proffered no proof, or insufficient proof, of conspiracy to restrain operation of the Erlanger Theatre.

2. Plaintiff's evidence of amount of damage was too speculative to warrant recovery.

The Warner defendants advance the second point *but not the first.* In fact, they expressly repudiate the first point. For example, at page 7 of their brief they say:

> ". . . the question of monopolization has become academic.
>
> The only question that still remains . . . is . . . the question as to whether plaintiff is entitled to recover millions[8] of dollars . . .
>
> The Warner defendants therefore ask certiorari primarily because the issues affect the damages assessed."

The apparent truth is that the Warner defendants have refused to subscribe to the first point of argument because they know that that argument is so unfounded that it cannot prevail.

We shall therefore argue it only briefly.

The basic fact is that each and every one of the Distributor defendants (controlling, as they do, virtually all of the first-class feature motion picture films produced in the country) uniformly refused to license so much as a single picture to plaintiff for exhibition at the Erlanger Theatre, and the question is:

What caused this unanimity of action?

The answer made by the defendants is that the Erlanger Theatre was found objectionable because (1) it is "off location" and (2) it had a bad reputation because it had been closed for a large part of the time preceding its acquisition by the plaintiff.

That this answer is nothing more than a sham is evident, first, from the fact that it conflicts with the unchallenged findings of fact made by the trial Court, and secondly, from the admitted facts pertaining to the Warner Bros.' Mastbaum Theatre (*supra*, pages 8-9).

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[8] An obvious exaggeration. The total amount of the judgment entered in this case, after trebling of the verdict, and including counsel fees is $435,000.

As to location, the Erlanger Theatre is on the same street as the Mastbaum Theatre and only one city block distant therefrom; and as to reputation for successful operation, the effects of the depression caused the closing of both the Mastbaum and Erlanger, but the Erlanger was not closed as much as the Mastbaum, because the Mastbaum was closed continuously from March 3, 1935 to September 3, 1942, whereas the Erlanger was open and operating during a large part of that time (R. 222a, 1142-44a).

Therefore it cannot be successfully denied that both with respect to location and reputation for successful operation, the Erlanger Theatre was, and is, as good as the Mastbaum, and yet the admitted fact is that Warner Bros. reopened the Mastbaum in 1942, and it immediately proved to be "conspicuously successful" (R. 1008a).

We therefore submit that it is idle for the defendants to attempt to argue that either the location or reputation of the Erlanger Theatre would have prevented successful operation thereof if the defendants had released to it the necessary supply of pictures.

Further with respect to the element of location it may be noted that:

1. All of the Warner Bros.' first-run Philadelphia theatres, and the Erlanger Theatre, are located in a very small section in central Philadelphia and are all so close together that the farthest apart are within a few minutes walking distance of each other. (See footnote 4, page 9, *supra*.)

2. The defendants' objections are plain afterthoughts. No such objections were made in the answer to the complaint, or in answer to interrogatories, or even in the trial court after a finding of fact to the contrary had been made. (See finding of fact No. 7, *supra*, pages 5-6.)

3. At the second phase of the trial, the defendants called an opinion witness—Jay Emanuel—for the purpose of

attacking the Erlanger Theatre, but on cross-examination this witness gave his employers' case away by testifying as follows (R. 707-708a):

> "Q. You don't think, however, that if the Erlanger Theatre had good pictures it could be successful?
>
> A. I didn't say that.
>
> Q. Well, I am asking you whether you think that or not.
>
> A. No. If the Erlanger had good pictures, all A pictures.
>
> Q. Yes.
>
> A. No doubt it would be very successful."

It therefore follows that there is on this record only one possible rationalization of the fact that plaintiff could not get a supply of pictures for the Erlanger Theatre, and that is that in accordance with the defendants' overall plans the defendant Warner Bros. was given the exclusive right to exploit the first-run exhibition business in the tri-state Philadelphia district.[9] Producers or manufacturers cannot flout the Anti-Trust laws merely by appointing one of their own number their sole outlet in a great territory.

We submit that if the distributor defendants had really wanted to obtain the best Philadelphia theatre outlet for their productions it is inconceivable that not one of them would have taken advantage of the excellent facilities offered by Erlanger Theatre, instead of persisting in licensing all of their pictures to the five Warner Bros.' theatres, in which each one of them had to compete for playing time not only against all the other members of the distributor

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[9] The defendants' argument (Brief, pp. 21-22) to the effect that the Circuit Court found defendants guilty of conspiracy solely because they did not call any witnesses is obviously unfounded. The finding of conspiracy was based primarily on the admitted facts of the case, and the inescapable inferences thereof. Under the rule that a person is presumed to have intended the natural consequences of his act, the calling of witnesses by the defendants in this case would have been futile: Cf. United States v. Masonite Corp., 316 U.S. 265, 275 (1942).

group but also against Warner Bros. itself, a producer and distributor of films as well as an exhibitor.

Apparently it was considerations such as these that led the trial court, as aforesaid, to find as a fact that (R. 937-38a):

> "30. The distributor defendants have refused to lease pictures for exhibition at the Erlanger Theatre solely because that theatre was not under the control of Stanley Company of America, Inc., and if said theatre had been under the control of the Stanley Company of America, Inc., the distributor defendants would have leased pictures for exhibition therein at all times since November 9, 1940."

And apparently the same considerations led the Warner defendants to repudiate the whole argument.

The brief of the Distributor defendants is devoted mainly to an attempt to argue that there is no evidence on the record to support the abovequoted finding of fact by the District Court, and other similar findings, adopted by the Circuit Court of Appeals as the basis for its decision. We submit that much of this argument consists of distortions of fact and unwarranted conclusions, not requiring detailed answer.

In any event, it is submitted, in view of what has been stated herein, and the fact that a verdict has been found by the trier of the facts against the defendants, it must be concluded that the findings of the District Court, affirmed by the Circuit Court of Appeals, are at least consistent with the evidence and are now, therefore, beyond the range of successful challenge. The point here involved was succinctly stated by this Court in Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359 at page 375 as follows:

> " 'Clearly,' as was said by the court of appeals, 'it could not be held as a matter of law that the defendant

> was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.' This question was submitted under proper instructions. And the weight of the evidence being in such case exclusively a question for the jury, its determination is conclusive upon this question of fact [citing cases]."

The distributor defendants argue that the fact that they have leased feature pictures to plaintiff for first-run exhibition at three other Philadelphia theatres acquired by plaintiff since this action was commenced, indicates that the defendants never had any intention to foster or perpetuate the Warner monopoly, and that their treatment of the Erlanger Theatre was the result of an honest belief that that theatre was inferior to the Warner theatres. Our reply to that argument is that none of the defendants offered to lease any pictures to plaintiff, for exhibition at any theatre, until after the Circuit Court of Appeals rendered its decision holding that the defendants were guilty of a conspiracy to violate the anti-trust laws, and we submit that it is a fair inference from all the facts that no such offer ever would have been made but for the beneficial effect of that decision.

The distributor defendants contend (Brief, p. 25) that: "There is a direct conflict between the Second and Third Circuits as to the monopoly phases of this case." This contention is based on the decision of the expediting court in United States v. Paramount Pictures, Inc., et al., 66 F. Supp. 323, to the effect that the defendants' acquisition of theatres, *per se*, does not constitute a violation of the anti-trust laws. The defendants' conclusion is a *non sequitur*. The decision in the case at bar was based not alone on the fact that one of the defendants owns and operates all the theatres in this district, but on the additional proof that all the defendants have attempted to stifle the plaintiff as a potential competitor.

This record furthermore contains evidence of practices typical of actions of monopolists attempting to protect an existing monopoly in defiance of the Anti-Trust Laws. See for instance Harry Warner's illuminating telegram (R. 1127a) to Sydney Kent of Fox Film Corp. expressing astonishment at finding a Fox picture in a theatre other than a Warner theatre:

> "... Why anyone in the world would permit this to happen at a theatre off location and one closed for a long period when we have Aldine available for high priced pictures is beyond my understanding. If this is the sort of cooperation we can expect from you and your company I certainly shudder for the balance of the business. Am leaving for Florida and regret having discovered the above because all my trip is spoiled. Regards."

Of course the whole tenor of the evidence as to the rejection by the defendants through uniform separate action and parallel expressions was, as the Circuit Court of Appeals pointed out, persuasive evidence of an illegal continuance of an established monopoly.

Point II.

The Proof of Amount of Damage Was Sufficient.

Plaintiff proved the amount of probable loss by showing the receipts, operating costs and profits of comparable theatres in the same neighborhood, to wit, the five theatres operated by Warner Bros., the defendant monopolist.

Since plaintiff was never afforded the opportunity of placing its theatre in operation, no other method of proof of damage was possible, and the method followed was expressly approved by this court in Bigelow v. R. K. O. Radio Pictures, Inc., 327 U. S. 251 (1946).

In the Bigelow case, the plaintiff submitted to the jury two methods of proving amount of damage, one of which was based on a comparison between the earnings of the plaintiff's theatre and the earnings of a comparable theatre owned and operated by one of the defendants. The Court plainly indicated its approval of this method of proof.

If the rule were otherwise, no owner of a new theatre could ever recover for loss of profit, no matter how vicious the restraint of commerce might be shown to be and thus wrongdoers would be enabled to take advantage of their own wrong, which is contrary to the dictates of reason and to the authorities:—Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359 (1925); Story Parchment Co. v. Paterson Co., 282 U. S. 555 (1937).

On this phase of the case, the Circuit Court of Appeals, in its *per curiam* opinion (R. 1342) adopted the very thorough opinion of the District Court (R. 1001a). In the interest of brevity the respondent does likewise, and respectfully directs attention particularly to that part of the opinion appearing in the record at pages 1003a to 1009a.

The distributor defendants (Brief, p. 24) contend that: "There is a direct conflict between the Third Circuit and the Second and Eighth Circuits as to the rule of damages in this case." The alleged conflict is based upon the decisions in two cases, viz., Central C. & C. Co. v. Hartman, 111 Fed. 96 and Baush Mach. Tool Co. v. Aluminum Co. of America, 79 Fed. 2d 217. It is submitted that the applicable rules are settled by the above cited cases decided by this Court, and that, therefore, conflict in the circuits, if any existed, becomes immaterial. It is further submitted that a careful reading of the Circuit Court cases cited will show that no real conflict exists.

The defendants refer to the many cases pending against them (Petition, pp. 26-27) and conclude with the assertion that:

> "We repeat this decision, if unreversed, may well spell the ruin of the motion picture industry."

We submit that to correct existing abuses is not to ruin but to restore the health of the industry.

CONCLUSION.

The case was correctly decided below and involves no conflict of decisions or important question of law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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